



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 25, 1996

Mr. Rick Perry
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR96-0077

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 37776.

The Texas Department of Agriculture (the "department") received a request for "all documents concerning an investigation . . . with incident number 05-95-005, including, but not limited to, complaints, letters, investigation notes, field notes, logs, affidavits, reports, conclusions, findings, and any records of actions taken pursuant to the investigation." You have forwarded a redacted copy of the incident report to the requestor. You believe that the three redacted sentences are excepted from disclosure by section 5.08 of the Medical Practice Act; V.T.C.S. article 4495b. The source of the medical information in each sentence is unclear, but it does appear that the complainant gave some of the information in the incident report to the investigator. Disclosure of medical information obtained from the complainant and disclosure of medical information obtained from a physician are distinct issues that we must address separately.

Section 5.08 of the Medical Practice Act provides, in part:

- (a) Communications *between one licensed to practice medicine*, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.
- (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are *created or maintained by a physician* are

confidential and privileged and may not be disclosed except as provided in this section. [Emphasis added].

Information "generated by a physician" is excepted from disclosure by section 552.101 of the Government Code as information deemed confidential by statute, specifically section 5.08 of the Medical Practice Act. Attorney General Opinion MW-381 (1981). However, when an employee gives his medical history to his employer, the medical history is not generated by a physician and is therefore not covered by section 5.08. Open Records Decision No. 316 (1982). Similarly, because the complainant provided some of medical information in the incident report to the investigator, the information is not confidential under section 5.08.

Although medical information provided by the complainant is not protected by section 5.08, we must consider whether it is excepted from disclosure under section 552.101 by the doctrine of common-law privacy. Information may be withheld on the basis of common-law privacy if it is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 562 at 9, 561 at 5, 554 at 3 (1990). The medical information contained in the incident report is not the type of information generally considered highly intimate or embarrassing. *See, e.g.*, Open Records Decision No. 343 (1982) at 1-2. Consequently, any medical information that the complainant gave to the investigator must be released.

Section 5.08(c) provides as follows:

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(c) does protect medical information in the hands of one who receives it or summarizes it *from* a physician's confidential communications or records. *See, e.g.*, Open Records Decision No. 507 (1988) at 3. In accordance with section 5.08(c), the department cannot disclose such information unless disclosure "is consistent with the authorized purposes for which the information was first obtained." The department may have obtained medical information from the complainant's physician as part of its investigation into pesticide use. The department cannot now disclose this information in response to an open records request, as such disclosure would be inconsistent with the purpose for which the department sought the information. Although the department should disclose that medical information it obtained from the complainant, the department should withhold any information it obtained from the complainant's physician.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and is not a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 37776

Enclosures: Submitted documents

cc: Mr. John W. Ghezzi
Holtzman Urquhart Bayko & Moore, P.C.
900 Two Houston Center
909 Fannin
Houston, Texas 77010-1005
(w/o enclosures)